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Supreme Court, U.S.
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No. 02-1731

IN THE

# Supreme Court of the United States

SODEXHO MARRIOTT SERVICES, INC.,

*Petitioner,*

*v.*

CYNTHIA CARTER McREYNOLDS,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## REPLY BRIEF

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## STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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## A. Overview

The Brief for Respondents in Opposition to Petition for Writ of Certiorari ("Response") submitted by Respondents Cynthia Carter McReynolds, *et al.*, fails at the most fundamental level: it ***never*** addresses the narrow legal issue presented by Sodexho's Petition – whether the D.C. Circuit abused its discretion by limiting its grant of interlocutory appeals under Fed. R. Civ. P. 23(f) to those rare class certification decisions that present (i) manifest error by the district court, (ii) an unsettled fundamental issue of law that is likely to evade end-of-the-case review, or (iii) a "death knell" impact terminating the case. Remarkably, the Response never mentions this stringent standard and thus makes no attempt to reconcile that standard's clear conflict with the unambiguous history of Rule 23(f) that interlocutory appellate review should be available for class action certification decisions raising important and unsettled issues of law.

Instead, Respondents proclaim that the circuit courts are vested with "standardless discretion" by Rule 23(f) (Response at 12) such that this Court should never review decisions to grant or deny appeal under that Rule. Respondents mince no words regarding this Court's purported lack of authority, stating unequivocally that "[t]he exercise of discretionary jurisdiction [by the circuit courts] would not be 'unfettered' if this Court were to second-guess how the appellate court exercised its discretion, applying a legal standard of this Court's making." (Response at 13).

The proposition that an appellate court has "standardless discretion" to reject, effectively, a rule of civil procedure approved by this Court, and that such a ruling lies beyond this Court's power to correct, is breathtaking in its scope. Respondents cite no precedents by this Court supporting this carve-out of a unique category of unreviewable appellate decisions, and Sodexho is unaware of any. If a circuit court abuses its discretion by electing to nullify Rule 23(f), this Court

has the unquestionable authority to act and to compel that court to apply the Rule.

Respondents' other arguments fare no better. For example, their contention that the D.C. Circuit's standard satisfies Rule 23(f) because the D.C. Circuit has stated that it would exercise its discretion "flexibly" (Response at 11) ignores the cold record of the D.C. Circuit decisions, which deny Rule 23(f) review in all cases and adopt standards that make it virtually impossible to obtain review absent "manifest error" or the rare circumstance where it can be proven that the certification decision will elude subsequent end-of-the-case review. For that same reason, Respondents' contention that no conflict exists among the circuits because the D.C. Circuit has stated that it, like the other circuits, allows for "flexibility" in its Rule 23(f) analysis (Response at 14-18), flies in the face of the D.C. Circuit decisions, which apply the three-part test so rigidly as to preclude any meaningful chance of appeal. *See, e.g., In re Veneman*, 309 F.3d 789, 794-96 (D.C. Cir. 2002).

Class certification is too significant an issue, often the case-deciding event, to apply normal prohibitions against interlocutory appeal. That fact – which led the Advisory Committee to promulgate Rule 23(f), this Court to adopt the Rule, and numerous circuit courts to grant appeals under the Rule – is ignored by Respondents. Their position, that circuit courts have absolute discretion to refuse to apply the Rule in all but the most extraordinary hypothetical circumstances, and that this Court has no role in correcting such a misinterpretation and misapplication of the Rule, should be rejected by the Court. The D.C. Circuit's antipathy to appeals under Rule 23(f) defeats the Rule's objective. This Court can and should review whether such a standard is permissible.

## B. This Court Has Authority To Review The Circuits' Rule 23(f) Decisions

Respondents' principal contention, that this Court should not step in to correct the D.C. Circuit's erroneous interpretation of Rule 23, speaks for itself. This Court has a profound obligation to prevent a circuit court from using its discretion, however broad, to avoid implementing the Rule entirely. This principle cannot be swept aside, as Respondents would have it, under the guise of the circuit courts' broad discretion under Rule 23(f). The circuit courts have discretion to apply the Rule, not to defeat it. That discretion is abused if a circuit court refuses to accept Rule 23(f) appeals in all but the most extreme of cases.

This Court obviously retains authority to correct any abuse of discretion by the circuit courts, especially one that rests upon an erroneous interpretation of a rule of civil procedure. Nothing in the Rule, the Advisory Committee Notes, or the Advisory Committee Minutes, states that the Court will not exercise its customary role to oversee implementation of Rule 23(f) by the lower courts.[1] Where one or more circuits have abused their discretion by refusing to accept Rule 23(f) appeals in all but the most extreme of cases, this Court has the inherent authority to step in and require adherence to the Rule.

Respondents' argument regarding the horrors that would result from Supreme Court consideration of Rule 23(f) rests on a misstated and egregiously exaggerated account of Sodexho's Petition. According to Respondents, Sodexho seeks certiorari so that this Court could "impose [a] single review standard on

1. Respondents' contention that the "rulemaking process that culminated in Rule 23(f) concluded that each appellate court should have free reign to pass on interlocutory review petitions as that court sees fit" (Response at 15) conspicuously fails to cite to any such process. The Advisory Committee made clear that the circuit courts would be free to develop their own individual standards. It did not state that the circuit courts were free to establish standards so stringent that leave for appeal would never be granted.

the courts of appeals." (Response at 15). That is obviously not so. Certiorari is necessary here because the D.C. Circuit has adopted standards that, while paying lip-service to the Rule, effectively render the Rule useless. The myriad formulations of the other circuits, *see* Petition at 17-19, would not be affected.

Finally, Respondents' suggestion that judicial error in implementing Rule 23(f) should be left to Congress or to the Rules Committee is unsound. It is the province of this Court, not Congress or the Rules Committee, to resolve conflicts among the circuits involving erroneous interpretations of rules of civil procedure.[2]

### C. The D.C. Circuit's Standard Conflicts With Other Circuits And Negates Rule 23(f)

Respondents ignore the D.C. Circuit's actual standard for good reason. By limiting appeals under Rule 23(f) to cases of manifest error or where there is clear proof that the class certification decision will evade end-of-the case review or sound the death knell of the litigation, the D.C. Circuit has set the bar for Rule 23(f) appeals so high that it is virtually impossible to satisfy. To date, no circuit court has granted appellate review of a certification decision under these standards, except under a much more liberal interpretation of the test for determining the

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2. The fact that Congress is considering a bill to eliminate the circuit courts' discretion to deny Rule 23(f) appeals – not surprisingly, the bill is opposed by the Rules Committee – only supports the need for the Court's intervention here. Decisions such as that of the D.C. Circuit in this case are fueling the preference of many in Congress regarding the need for an automatic right of interlocutory appeal of class certification decisions. If the circuit courts are to retain their discretion in deciding whether to hear such appeals, this Court should make clear that at least meritorious appeals presenting important unsettled issues of class action law may and will be heard.

likelihood of a certification decision evading end-of-the-case review.[3]

Indeed, Respondents are able to argue that that no conflict exists among the circuit courts only by ignoring the D.C. Circuit's standard. Rather than address that actual standard, Respondents focus on the fact that the D.C. Circuit describes its three-part test as "'guidance, not a rigid test'" and allows for considerable flexibility beyond any "bright-line" test. (Response at 16 (quoting *In re: Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 104, 105 (D.C. Cir. 2002)). Any such "flexibility" is purely cosmetic. In *Lorazepam*, the D.C. Circuit made clear that "Rule 23(f) review should be granted rarely where a case does not fall within one of these three categories," allowing only for vague, unforeseeable "special circumstances." *Id.* at 105-06. A subsequent decision, *In re Veneman*, 309 F.3d 789, 794-96 (D.C. Cir. 2002), leaves no doubt that this "flexibility" is a chimera. In *Veneman*, the D.C. Circuit acknowledged that petitioners *had* raised extremely important and novel issues regarding a district court's partial certification of a class without adequate consideration of Rule 23(b). Nonetheless, the circuit court denied review of the certification decision because of a perceived failure to specify Rule 23(c)(4) in the petition. *See id.* The message of *Lorazepam* and *Veneman*

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3. *See, e.g., In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002) ("Permitting appellate review before class certification can precipitate such a settlement is a principal function of Rule 23(f)."); *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir. 2001) (explaining that a "compelling case" for Rule 23(f) appeal occurs when the "the grant of a class status places undue pressure on a defendant to settle"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001) (concluding that interlocutory appeal is warranted because "certifying the class may place an unwarranted or hydraulic pressure to settle on defendants"); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001) (explaining that an order certifying a large class satisfies Rule 23(f) by placing a defendant in a "bet-your company decision").

is clear. In the D.C. Circuit, the door is shut on Rule 23(f) appeals.

As for the other circuits, Respondents' contention that the D.C. Circuit standard is no less liberal than that of the Third and Seventh Circuits (Response at 16-17) defies any legitimate case analysis. In the Third Circuit, interlocutory appellate review is deemed appropriate to correct "an erroneous ruling," to "facilitate development of the law on class certification," or to prevent excessive pressure on a defendant to settle. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001). The Seventh Circuit does not permit review simply to correct an error, but it does grant interlocutory appeal where the size of the proposed class puts inordinate settlement pressure on the defendant, the district court's decision is "problematic," or the Rule 23(f) petition raises "important legal principles" that "have evaded attention by appellate courts." *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001). *Accord, In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015-16 (7th Cir. 2002) (holding that where aggregating claims

> makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable – and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims[,] [p]ermitting appellate review before class certification can precipitate such a settlement is a principal function of Rule 23(f). . . . Another function is permitting appellate review of important legal issues that otherwise might prove elusive.);

*Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir. 2001) (granting Rule 23(f) appeal because certification decision placed "enormous" pressure on defendant to settle).

It is difficult to see a clearer conflict than in these decisions. None of the Third and Seventh Circuit factors, individually or

collectively, would permit interlocutory review in the D.C. Circuit, which expressly affirmed in *Veneman* that petitions raising even the most significant of Rule 23 issues will be denied if they cannot be proven to evade end-of-the-case review. *See Veneman*, 309 F.3d at 794-96. No honest reading of *Szabo*, *Newton*, and their progeny could possibly view them as even remotely consonant with the D.C. Circuit rulings in *Lorazepam* and *Veneman*.[4]

Respondents also fail to explain the tangible proof of this clear conflict among the circuit courts – the fact that the D.C. Circuit has denied every Rule 23(f) petition it has ever reviewed, in stark contrast to the majority of such appeals that have been granted by the other circuit courts. *See* Petition at 13-15 n.6. This emphatic door-slamming on Rule 23(f) appeals is not a mere statistical anomaly, as Respondents would have it.

4. Instead of considering the holdings of those cases, Respondents point to insignificant dicta, such as the fact that all of the circuit court decisions on Rule 23(f) use the Seventh Circuit's decision in *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999), the first published opinion on Rule 23(f), as the starting point of their analyses. *See* Response at 16. Those statements mean little given the enormous gulf between the D.C. and Seventh Circuits that subsequently developed. As for Respondents' hyperbolic contention that the Petition is "warped" because it pointed out incongruities in decisions by the First and Second Circuits, *see* Response at 17 n.8, those incongruities speak for themselves. While stating that it was in accord with *Blair*, the First Circuit made a seemingly small but all-critical change: Rule 23(f) petitions presenting fundamental issues of law will not warrant interlocutory review unless they also are "likely to escape effective review." *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000). Conversely, the Second Circuit apparently dropped that requirement from its standards. *Contrast In re Sumitomo Copper Litig.*, 262 F.3d 134, 140 (2d Cir. 2001) (the source for the D.C. Circuit's three-part test in *Lorazepam*) *with In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 132 n.3 (2d Cir. 2001) (allowing interlocutory appeal under Rule 23(f) to address "a legal question about which there is a compelling need for immediate resolution" without requiring petitioner to demonstrate that that issue was likely to evade end-of-the-case review).

The six known denials of Rule 23(f) petitions by the D.C. Circuit (Petition at 13) ***exceed*** the number of known denials in the Third, Seventh, or Eleventh Circuits, even though, as Respondents contend, there may be as much as a twenty-fold difference in the number of class actions pending in the D.C. and Seventh Circuits.[5] (Response at 18). In the face of this evidence, Respondents' contention that the D.C. Circuit's standard is at least as liberal as that in the Seventh Circuit strains all credulity.

Finally, Respondents fail to reconcile the D.C. Circuit's standard with the clear history of the Advisory Committee's development of Rule 23(f). While citing the Committee's Note with regard to the broad discretion accorded to the circuit courts, Respondents ignore the Note's statement that permission to appeal under Rule 23(f) would most likely be granted when a certification decision "turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation." Fed. R. Civ. P. 23(f) Advisory Committee Note. By abandoning either test and instead adopting standards that effectively preclude Rule 23(f) review, the D.C. Circuit clearly abused its discretion.

### D. Sodexho's Rule 23(f) Appeal Merits Review By The D.C. Circuit

In briefly addressing the merits of Sodexho's Rule 23(f) Petition, Respondents do not dispute Sodexho's contentions that (1) the district court's decision contradicts numerous other district court and circuit decisions; (2) the D.C. Circuit has never addressed these issues; and (3) significant differences exist among other circuit courts. Instead, Respondents make the feeble argument that, because this Court has denied certiorari in

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5. This fact alone casts considerable doubt on the D.C. Circuit's antipathy to interlocutory appeals under Rule 23(f). In *Lorazepam*, 289 F.3d at 105-06, the D.C. Circuit identified "[t]he sheer number of class actions" as a foremost reason for narrowing the scope of Rule 23(f) review. Under Respondents' statistical analysis, that floodgates concern is wholly unwarranted.

some of these cases, the issues did not warrant review by the D.C. Circuit, and certiorari is not warranted now. *See* Response at 20-21. Again, Respondents confuse the purpose of Sodexho's Petition. Certiorari is needed to prevent circuit courts from defying Rule 23(f) by refusing to permit interlocutory appeals, not to address the merits of Sodexho's Rule 23(f) petition. The latter issues are germane only to demonstrate that the petition warrants Rule 23(f) review.

Respondents' lengthy diatribe repeating their factual allegations against Sodexho (Response at 1-9) similarly illustrates the weakness of their Response. The first half of the Response is largely a trial brief, alleging acts of discrimination that have little bearing on Sodexho's Rule 23(f) petition. Too many facts are bludgeoned by Respondents to address here. Suffice it to say, there is ample evidence to the contrary; some facts are just plain wrong or misleading (*e.g.*, citing statements that disparage Sodexho's practices without attributing them as assertions by the plaintiffs); and other facts are just exaggerated, such as the reliance on an "expert" industrial psychologist's opinion when that opinion was so flimsy that the district court did not even credit it in its certification decision.

## E. Conclusion

The decision to certify a putative class often constitutes the single most significant event in deciding the outcome of a class action lawsuit, as commentators and many in Congress have recognized. Fed. R. Civ. P. 23(f) was promulgated so that significant class certification decisions could be appealed and reviewed before trial to ensure uniformity of decisions, to prevent significant errors, and to avoid imposing unwarranted settlement pressures on defendants through erroneous certifications. This Court should grant a Writ of Certiorari to ensure that the circuit courts are not permitted to bypass this vital safeguard.

Respectfully submitted,

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